MOHD. ROSHI CHIK

v.

ARUMUGAM MANICKAM & ANOR.

HIGH COURT MALAYA, TEMERLOH
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 90 OF 1984]
22 NOVEMBER 1984

TORT: *Negligence - Motor accident - Whether defendant liable - Whether maxim "res ipsa loquitor" applicable.*

The action arose as a result of a fatal road accident on the Kuala Lumpur - Rompin road in which one Zainal Abidin bin Abdullah, the driver of the car involved in the accident, and his wife died. Zainal Abidin's next of kin and administrator of the estate brought the action against the driver and the owner of the other vehicle, a lorry, involved in the accident. The Court had to rely on the 1st defendant, the driver of the lorry, and on neutral evidence such as photographs and sketch plans.

Held:
The deceased Zainal Abidin was solely to blame for the accident. The maxim *res ipsa loquitor* did not apply in favour of the plaintiff.

[Plaintiff 's claim dismised with costs.]

For the plaintiff - Harcharan Singh; M/s. Suhaimi Khor Zulkifli & Chang
For the defendants - S.P. Velloo; M/s. V.P. Nathan & Partners

JUDGMENT

Shaik Daud Ismail J:

This action arose as a result of a fatal road accident on 21 August 1978 in which one Zainal Abidin bin Abdullah died. His next of kin and administrator of the estate, Mohd. Roshi b. Chik, a step-son of the deceased, brought this action against the driver and owner of the other vehicle involved.

In this most unfortunate accident both the deceased and his wife who were in car No. BAW 7557 died. In view of this the Court has to rely on the evidence of the 1st defendant the driver of lorry No. BU 4483 and other neutral evidence like photographs and sketch plans.

According to the testimony of Arumugam s/o Manikam the 1st defendant and the driver of lorry BU 4483, on the day in question he drove this lorry from Kuala Lumpur to Rompin. On the way at about 3 a.m. when he arrived somewhere near the 16½ m.s. a car coming from the opposite direction came into his path and collided with his lorry. According to the 1st defendant when he saw the car suddenly coming into his path he applied his brakes, sounded his horn, switched on his headlights, but as the car was too near and after he (1st defendant) managed to stop his lorry the car came and collided with the lorry. He said that when he applied his brakes he went to the left edge of the road. At the time of the accident the position of his lorry was as shown in the photograph D1A. Now photograph D1A shows that both the front and rear near-side tyres of the lorry were off the road proper. In cross-examination 1st defendant stated that when he first saw the car it was some 300 to 400 feet away but it started coming into his path when it was only 150 feet away. When he first saw

the car it had its high beam on. The 1st defendant said he then flashed on and off his high beam too but the car never dipped its headlights. When it reached about 150 feet away it suddenly came into his path. On seeing this he braked and sounded his horn and just as his lorry stopped by the side of the road the car came and knocked into the lorry. After the impact the car bounced back.

At the close of the case and after hearing the evidence of the 1st defendant, I find that he is telling the truth on how the accident occurred. His evidence on the whole tallied squarely with the other neutral evidence principally the sketch plan and photographs. Both parties are not disputing the fact that the impact took place at the path of the 1st defendant in fact almost to the edge of the road. There was no allegation by the plaintiff that the 1st defendant eneroached into the plaintiff's path, on the contrary evidence clearly and undoubtedly show that the deceased's car encroached into the path of the 1st defendant. This is borne out by the evidence of the 1st defendant, the sketch plan and photographs. The lorry's brake marks on the sketch plan clearly showed that it was veering towards the left edge of the road as stated by the 1st defendant. In fact the 1st defendant's version of the accident is entirely corroborated by the sketch plan and photographs.

The plaintiff's Counsel in his submission urged upon the Court that in view of the facts prevailing it cannot be held that the deceased was the author of his own misfortune but that his misfortune was caused by the defendant. It is his contention that the defendant's continuous flashing of his high beam lights towards the deceased had caused the deceased momentary blindness sufficient to cause the deceased to lose his sense of directions and as a result the deceased came into the path of the defendant. In that event, it was the defendant who caused the deceased to collide with the lorry, and the defendant should be solely held liable.

Learned Counsel also contended that in the light of the evidence, the Court invoke the maxim of *res ipsa loquitor* and hold the 1st defendant solely liable or alternatively to the extent of at least 75%.

With respect I cannot see how in the first place the maxim *res ipsa loquitor* can rightly be applied in this case in favour of the plaintiff. I am of view that if the maxim applies at all it would apply in favour of the defendant. The very fact of the deceased's car encroaching the path of the 1st defendant was, to my mind, sufficient to show negligence on the part of the deceased. There is no doubt of this fact as even the plaintiff's Counsel conceded that deceased's car came into the path of the 1st defendant. The only fact which could not be explained and of which there are no evidence at all is as to why the deceased's car behaved the way it did. The only person who could explain this is now dead. The learned Counsel for plaintiff urged upon me to accept his theory as to why the deceased's car behaved in that manner. With respect again his theory of the momentary blindness by the deceased is mere conjecture. There is no scrap of evidence upon which I can infer this. The plaintiff's Counsel throughout his submission kept on using the expression "continuous flashing of the light" which caused this so-called momentary blindness. With respect there is no evidence or even a hint of this. The 1st defendant said he merely flashed his high beam a few times to warn the driver of the oncoming car. The question of continuous flashing does not arise. In the light of the evidence before me, I hold that there is no evidence of continuous flashing of the high beam by the 1st defendant. Secondly, it was also urged upon the Court to hold the 1st defendant wholly liable because 1st defendant was speeding. The Court is urged to infer speeding on the part of the 1st defendant merely on his evidence that he was in a

hurry. Again with respect, the Court has no basis upon which to infer speeding by the lorry. The length of the brake marks is consistent with the 1st defendant's evidence that he was travelling at about 50 mph. It must be emphasised that the 1st defendant's vehicle is a heavy vehicle. It is a trailer for carrying timber and at the time of the accident it was coming down a gradual slope. Bearing this in mind, the brake mark of about 78 feet long is consistent with the 1st defendant not actually speeding.

On the basis of the facts before me, I find that plaintiff has not proved at all that the 1st defendant was in any way negligent or that he had in any way contributed to the accident. On the contrary I find that the evidence disclosed undoubtedly that the fault lies with the deceased. In the event I dismissed the plaintiff's action with costs.

Be that as it may, I feel duty-bound to consider the quantum of damages I would have awarded if the plaintiff had successfully proved its case.

It is common ground that the deceased's earning was RM705 p.m. at the time of his death. He was then 48 years old and would have retired when he reaches the age of 55. For pre-trial loss his earnings should be calculated as at the date of death. In all circumstances, having taken into consideration all his expenses, I would have awarded a dependency of RM250 from the date of the accident to the date of hearing i.e., 6 years totalling RM18,000. As for post trial loss the plaintiff's Counsel urged upon the Court to accept that the deceased would most likely apply to be re-employed until his 6 year-old child attains the age of 18, thus leaving 12 more years of active purchase. With respect, I cannot agree with this. There is no evidence or even a hint that deceased would be re-employed after he attained the age of 55. I am of the view that it is highly unlikely that he would be re-employed after his retirement as it has never been the practice in the teaching profession. I would agree with defence Counsel's submission on this and hold that deceased had seven years left and taking contingencies into account he had 5 years of active purchase. His post trial earnings would have been RM1045 and less all expenses he would have about RM600. On this category I would have awarded a total sum of RM36,000. For loss of expectation of life another RM4,000. I would also award a sum of RM1,000 as special damages for funeral expenses.

Also found at [1985] 1 CLJ 105